IN SENATE OF THE UNITED STATES.

August 29, 1842.
Ordered to be printed.

Mr. Henderson submitted the following

REPORT:

The Committee on Private Land Claims, to whom was referred a report from the Commissioner of the General Land Office, in obedience to the resolution of the Senate of the 2d March, 1842, requiring, "a statement showing the construction given by him in practice to the act of 4th July, 1836, confirming the reports of the board of commissioners appointed to investigate private land claims in Missouri, under the act of 9th July, 1832, and 2d March, 1833, and whether, in his opinion, further legislation is necessary to carry out effectively and justly said act of July 4, 1836," have considered of the matters submitted, and instructed me to report:

The statement of the Commissioner, submitted to the committee, presents *seven* rules or principles of construction, by which it is proposed to administer the act of 1836; the first *four* of which only, in the judgment of the committee, require any notice from them. These are found in the following extract from the commissioner's statement, viz:

"The undersigned has the honor respectfully to submit, that the construction which he gives to the aforesaid act of 4th July, 1836, is as follows:

"That all claims confirmed by the aforesaid act of 4th July, 1836, are subject to, and must yield to,

"1st. Prior confirmation.

"2d. School sections.

"3d. To ordinary sales prior to the said confirmatory act of 4th July, 1836.

"4th. To New Madrid locations under the act of 17th February, 1815."

The Commissioner's report proceeds to state, that,

"The construction stated in the foregoing, as now given to the act, is in accordance with, and *governed by*, the Attorney General's opinion of the 7th December last."—(Copy A, herewith.)

This opinion of the Attorney General, its reasonings and conclusions as adopted by the Commissioner, is the essential matter, therefore, which the committee have considered of.

The resolution of the Senate was obviously to ascertain whether the claimants, confirmed by said act of 4th July, 1836, were obtaining, or likely to obtain, under its administration, the land and their titles which the act contemplated to secure to them; and, if not, what interfering claims, or peculiar construction of the act of 1836, deprived them; and what, if any further legislation was requisite to assure them those rights contemplated by said act.

Thomas Allen, print.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

It is perfectly obvious to the committee, that, if the construction of the Land Office Department be correct, and that, by virtue of *all subsisting laws*, the claims under the act of 1836, are *lawfully* postponed to the prior rights of the four several classes of claims before enumerated, that (except as to the school sections) there can be no doubt, further legislation would be fruitless and unavailing to reverse this order of precedence and priority in favor of the claims under the act of 1836. Congress, it is true, might direct its executive and ministerial officers to award such precedence in the formalities of issuing title, but the courts of the country would be bound by no such procedure. If by the laws—all the laws of the country bearing upon the subject—these rights to private property, these several rights vested under the laws, attach in their order of priority as the land department has arranged them, the power of Congress *is now* utterly impotent to impair and change such order of priority. These rights, as now existing in legal verity, can be varied or changed, by no other power in this country, than the will and agreement of the parties.

It may be perceived in advance, from this postulate of the committee, that it is their opinion an erroneous construction of the laws, and of the relative rights of the several classes of claimants so presented in conflict under those laws by the land department, is not, and can not be conclusive upon those rights. The judgment of the Executive Department in *construing* and *administering* law, becomes no rule of decision for the court, nor can disparage or divest any private legal right, when brought before the judicial tribunals for decision.

The committee, however, have not thought this view of the subject should relieve them from an examination into the correctness of the opinion of the Attorney General, adopted as the law of the land department, and of some more extended exposition of the grounds assumed by your committee as to the jurisdiction of the courts over private rights and interests, which rights are brought to view under such restricted and disparaging circumstances in said opinion.

In their investigations, your committee have been willing to entertain it as a presumption that Congress, in all its legislation upon these diversified land claims, has *intended* to maintain a uniformity of action,—to respect treaty obligations,—to award justice among adverse claimants, and insure protection to private property. And whenever Congress may have prescribed rules in form of law, and issued its mandates to *ministerial officers*, in conflict with these great principles, your committee so far concur in the opinion of the Attorney General, that these directions, precisely as intended, *become the rules of duty to all ministerial functionaries.* This view of the subject would seem to limit all inquiry, *in the present case*, to a fair comparative exposition of the several acts of Congress upon the subjects involved; and from these to determine what Congress has adjudged, and what appointed as its will.

The Attorney General, to aid him in the construction of these statutes (and properly enough), has resorted to an expose of the motives, duties, and prerogatives, of Congress. In this part of his investigation the extremes of sovereign power are vindicated, in the opinion of the committee, with too little of distrust or suspicion; and treaty obligations, and private rights of the citizen, as if unsustained by the laws of nations, the Constitution of the United States, and the plighted faith of our country, are made to melt away to a mere question of *convenience*, and to become the

facile material of legislative discretion. These premises were surveyed to perhaps a wider extent than was necessary to the solution of the questions propounded; and, assuming hypotheses which, in the opinion of the committee, were fallacious in fact, and unfounded in law, the conclusions could hardly fail to result in error. This opinion, therefore, being adopted by the Land Office as the rightful construction of the acts referred to, and the rightfulness of this construction being so vindicated by the elaborate reasoning of the report, the committee deem it equally important they should respond to the *premise* as to the *conclusion*.

"In the first place," says the Attorney General, "it is to be remembered that the *confirmees* UNDER THE TREATY claim *not property*, strictly so called, or the *dominium* of the civil law, but the doings of what is necessary to complete title and convey property."

This assertion of the Attorney General is made with respect to claims of *land*, the *rights* to which had accrued under the Spanish and French Governments of Louisiana, and the *rights* to *which land* were assured by treaty stipulations. The specific claims referred to in this opinion are described in the act of Congress of 9th July, 1832, which submits them for examination to a board of commissioners, as "all the unconfirmed *claims to land* in that State [Missouri] heretofore filed in the office of the said recorder according to law, founded upon any incomplete *grant, concession, warrant, or order of survey*, issued by the *authority* of *France* or *Spain* prior to the 10th day of March, 1804."

The committee can not puzzle themselves with a doubt, whatever may be the *dominium of the civil law*, that these claimants claimed *land*,—that *land* is property,—and a *claim* to land is property; and that a *claim* to land, in all the reason of the thing, *may* comprehend every conceivable *right* to the land, though the *form of title* or the *evidence of right* may be defective or incomplete.

But the opinions and abstract speculation of the Attorney General and of this committee as to what is the *law*, as applicable to the known facts, are alike superfluous. That highest tribunal, whose judgment *evidences* the law, has determined the direct question.

In the case of Soulard and others *vs.* the United States (4 Peters' Rep., 511), the court say, "In the treaty by which Louisiana was acquired, the United States *stipulated* that the inhabitants of the ceded territory should be protected in the free enjoyment of their *property*. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been asserted in the contract.

The term "*property*, as applied to lands comprehends *every species of title, either inchoate or complete*. It is supposed to embrace those *rights which lie in contract;* those which are *executory*, as well as those which are *executed*. In this respect the relation of the inhabitants to their government *is not changed*. The new government takes the place of that which has passed away."

Again: In the case of "Delusas, *vs.* the United States," 9 Pet. R. 133, the late Chief Justice Marshall, after reciting the provisions of the Louisiana treaty, proceeds to observe:

"These are the stipulations which afford that protection or security to *claims to land*, under the French or Spanish Governments, to which the act of Congress refers. They extend to *all property* * * * The *right of property*, then, is protected and secured by the treaty; *and no prin-*

ciple is better settled, in this country, *than that an inchoate title to lands* IS PROPERTY.

"Independent of treaty stipulation, this right would be held sacred. * * * The people change their sovereign. Their rights to property remain unaffected by the change."

Your committee concur in these views of the Supreme Court, and consider they sufficiently establish that these claims to land, under the Louisiana treaty, are real and substantial *property*, and not merely the shadowy imbodiment of the right of petition.

The Attorney General further proceeds to say: "The lands to which they lay claim, form still (where patents have not been granted) *a part of the public domain of the United States.*"

This position your committee do not regard as correct in any legal or moral sense. It may be true, they are not severed or set apart so as to be distinguished from the public domain by marks and boundaries. But this no more makes private property a part of the public domain, than the converse of the proposition on the same state of facts, makes the public domain private property. The cession of Louisiana granted to the United States only the sovereignty and *public property* of the territory, and expressly excepted from the grant all *private property.* So far as boundary lines between public and private property remained to be ascertained and established, it was the duty of the United States to concur in doing this in good faith and with all convenient despatch. But no *private property* was transmuted *into public domain* by postponing the ascertainment of these division lines.

Proceeding further, the Attorney General says that, "although the United States acknowledge themselves bound to provide for these claims, still the whole subject is in *contract*, and their rights are ONLY *jura ad rem* under a treaty with a foreign government."

Now if it were true, that, as between the claimants to these lands and the Government of the United States, the *right* subsisted only in "*contract*," it would justify no arbitrary discretion on the part of the Government. It is seen by the decision of the case "of Soulard and others *vs.* the United States," that the court say, "The term '*property*' as applied to lands comprehends every species of title * * * so as to embrace 'those rights which lie in *contract*, those which are executory as well as those which are executed.'" And as the United States stipulated in this treaty for the protection of "*property*," can any act of capricious power, disregarding this treaty obligation, be justified?

With these and like assumptions, the Attorney General proceeds to remark, that this distinction between "*property*" and a right of petition for damages on a breach of the nation's *contract*, "is very important with a view to the question, how they [these claims], are to be satisfied? how they are to be regarded by the courts of justice, &c., &c.? and amplifying on such fallacious premises, advances still farther and observes, "to say that Congress having granted *once* by treaty has no power to make a second grant, is to mistake a claim to land protected by treaty with a foreigner, for a title actually vested in a citizen under the constitution of the United States, which are in my judgment very different things."

The more literal of all which is, as your committee understand it, that a right to property acquired under a legitimate foreign Government is no right which we are bound to recognise. That the plighted faith of the nation made by treaty to respect such right, superinduces no obligation on the Gov-

ernment to protect the right, nor confers any right upon such citizen to demand that protection. That a treaty obligation incurred by this Government is no obligation under the constitution of the United States. And that citizens coming under the jurisdiction of this Government by treaty, as did those of Louisiana, can not invoke in our courts the constitution of the United States, the provisions of the treaty, the law of nations, or the common law, to vindicate such rights of property; and have no other claim at the hands of the legislative department than such as addresses itself to their grace and discretion.

If such as these be legitimate powers and principles springing out of this Government, the civilian, the politician, and administrators of our laws, have heretofore generally misapprehended them; and if correct, as now expounded by the Attorney General, are alike to be deprecated and deplored. But your committee do not so apprehend them.

If it be established (as the committee think it is), that these claims to land are *property*, *private property*, it is a curious proposition to maintain, that this Government *has a right* to dispose of *private property*, to *private persons*, *for private use;* and that the injured party has no other redress than by petition to the Government for damages. Any one taught to believe ours is a Government of laws, would naturally inquire with much confidence, how can the Government make a good title to one citizen of the private property of another citizen? or if such title be defective, can the Government invest its assignee with its own sovereign immunity from a judicial investigation of the subject?

It is not known to this committee that such powers are claimed *as of right* by any Government of Europe. It is a singular fact, if they exist in ours. Its powers and jurisdiction in these respects, and as applicable to these claims, will now be examined.

The first article of the treaty of Louisiana cedes to the United States in full *sovereignty* the territory and its appurtenances.

Article 2 explains that, "in the cession made by the preceding article, are included the adjacent islands belonging to Louisiana, all *public lots and squares*, *vacant lands*, and all public buildings, fortifications, barracks, and other edifices, *which are not private property*.

"Article 3. The *inhabitants* of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of *all* the *rights*, *advantages*, and *immunities* of citizens of the United States, and, in the meantime, shall be maintained and protected in the free enjoyment of their liberty, *property*, and the religion which they profess."

Your committee would confidently maintain, that the United States could not acquire any greater political power, or any wider range of legislative jurisdiction over territory and its inhabitants, acquired by treaty with a foreign Government, than it may lawfully exercise, *under the constitution of the United States*, over the territory and its resident citizens within their dominion at the date of the constitution. But it is seen by the treaty of Louisiana, that the United States do not profess to have sought or obtained more. In other words, they pledged themselves by treaty in favor of the ceded inhabitants, and their rights of person and property; to observance of the same obligations, substantially, which the constitution of the United States had imposed upon them with respect to citizens and their property in other territory of the United States; and which your committee believe would have

been the precise measure and limitation of their power, if these declaratory and express guaranties had not been inserted in the treaty. That is, if the United States had not made such pledges by treaty, they could, nevertheless, have exercised *no other* powers, with respect to the religion, liberty, and property of these citizens, than authorized by the constitution of the United States. This Government could not have acquired the lawful power to maintain a monarchical form of government,—an exclusive church system, abolished the liberty of the citizen,—his right of trial by jury,—the writ of *habeas corpus*,—the right of petition, and security of property,—*even had the treaty expressly authorized such powers.*

The constitution of the United States provides that—

"Congress shall make all needful rules and regulations respecting the territory or other property of the United States."

But all such rules and regulations as Congress may make, by virtue of this grant, must conform to other duties and limitations which they can not transcend. Hence,

"*Congress shall make no law*"—

Establishing a religion;

Abridging the freedom of speech or of the press;

Or, the right of petition;

Or, forbidding the people to keep and bear arms;

Or, to subject their papers and effects to unreasonable searches and seizures;

Or, deprive them of trial by jury;

Or, the privilege of the writ of *habeas corpus;*

Or, subject them to bills of attainder, or *ex post facto* laws;

Or, confer titles of nobility.

Nor shall "any person" be deprived of life, liberty, or "*property*, without due *process of law:* nor shall private property be taken for public use without just compensation."

These limitations your committee regard as not merely applicable to the *States, but as positive interdicts upon Government power*, in all its range of jurisdiction, and applicable to the *Territories as to the States.* If these land claims were still within a *Territory*, subject to the exclusive legislation of Congress, your committee would repudiate all powers and all legislation in Congress that discarded or transcended the constitutional limitation before enumerated. But the treaty as before quoted stipulated for the people of the ceded territory to be admitted into the Union. The Constitution of the United States provides, that "new States may be so admitted by the Congress into the Union;" and accordingly, the State of Missouri, a part of this Territory, and part of these ceded inhabitants, were admitted as a State into the Union in 1821, "*upon an equal footing with the original States.*" Hence, there can be now no question that the citizens of Missouri may invoke all the immunities and protection of the Constitution of the United States, and of all constitutional treaty stipulations in their favor. By art. 6 it is provided, "This constitution, and the *laws* of the United States which shall be made *in pursuance thereof*, and all treaties made, or which shall be made under the *authority of the* United States, shall be the *supreme law* of the land, and the *judges* in *every State shall be bound thereby.*"

Your committee, in quoting this plain language of the Constitution, will attempt no elucidation of it, than to observe what they suppose obvious to the apprehension of all, that acts of Congress, in form of law, *not made in*

pursuance of this constitution, or treaties NOT *made under*, but transcending the *authority* of the United States, are NOT the *supreme law of the land*, and the *judges* are *not bound thereby*.

Article 1, section 2. The judicial power "shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, *under their authority*."

Any treaty, then, to be valid, must be *pursuant to the authority of the United States*, and made *under it*. Any such treaty, together with the constitution *(but subordinate to it)*, are the *supreme law of the land*. In pursuance of such authority, then, a grant made under such treaty, or secured and protected by such treaty, is surely a grant made and protected under the constitution of the United States. Such a grant being secured by a supreme law of the land, and which all the judges are bound to recognise as supreme, can it fail to be protected in the courts? Your committee will forbear to say how far Congress may forbid jurisdiction to the *federal courts*, and so foreclose investigation and relief to these claims and claimants under said treaty. But they can not interdict the State courts from investigating *any title* or right to private property within the State's dominion. The confusion and difficulty which have surrounded these claims to land, and brought such numerous applications to Congress for relief, resulting in so much of questionable and complex legislation, has arisen thus: That the Government in all such cases occupied the position of claiming adverse to the *private* claimant, and reposing itself on its *physical powers*, and maintaining its sovereign immunity, which protected it against judicial controversy with a private citizen (except as matter of grace); it has assumed to *settle* by various laws of compromise and qualified recognitions of right, and by ministerial agencies of its own, in form of various boards of commissioners, *private rights to property—legal and constitutional rights*. without permitting the citizen to invoke a *judicial inquiry* upon them. The committee have no purpose of impeaching the previous legislation of Congress in this respect. It has often been, in a spirit of liberality, conferring titles where none but a naked possession obtained. It has resulted in settling claims, sometimes in full, sometimes with a limited and tardy satisfaction, which the claimants have accepted, for millions of acres of land. We advert to it only to investigate the legitimate powers of Congress, and the rights of the citizen, in respect to the subject. And in this view of it, the committee believe that Congress, in much of its legislation, has *assumed the province of the courts*, and decided many questions of private right to property, which were and are purely judicial. They believe, too, that many of these questions have been decided wrong, and that except where the party might be estopped by some actual or constructive abandonment of claim, or accord and satisfaction, the courts have a right to correct these wrongs. That the policy of Congress to withhold jurisdiction from the courts, while the United States continued the adverse claimant, can, by no postponement of the question, or any declaration in form of law, acting upon the courts, or assuming to *cancel* those Spanish or French titles, or forbidding them to be *received in evidence*, prevent the courts from taking cognizance of them as against any assignee of the United States; and of adjudging such titles upon their original merits and integrity. Congress can make no law affecting land, or the titles to land, *within a State*, only as the lands belong to the Government, and in respect to the title as to its form and manner of emanating from the Government. But the title, merely because it has emanated from the Govern-

ment of the United States, has no superior virtue over a title to the same land from any other Government or source of ownership. The fact that a boundary or dividing line of a French or Spanish grant in Missouri is not ascertained and established between the Government lands and the private claims, gives to Congress no other power and jurisdiction over the private claims, than to settle the boundary as a private owner might do. In this object public interest and public duty unite, and it may be kept in mind that the citizen could in no instance constrain the Government to such ascertainment of boundary. But the Government acquires no *direct power* over the private claim, from this relation to it. The Government may have questions of unsettled boundary between its lands adjacent to private property, in the old States, as well as the new. And these private claims in the old States are as much diversified in their form and source of title as those in the new, and as often derived from Indian grants and foreign Governments. Now, the only reasons for asserting a different jurisdiction over *private claims* in the new States than is assumed in the old States, are, that the Federal Government is proprietary of all the land in the new States *which is not private property;* and as such proprietary is regarded as invested with the *nominal legal title* of all *private claims* held by inchoate or incomplete form of title.

But the fact being *established or admitted*, that the *private claim exists* in good faith, and is only defective in *form of legal title*, or of uncertainty of its boundary, or both, the powers and duty of the General Government are clearly limited to fixing the boundary, and of releasing to the *owner of the property* the naked legal title which it may hold in trust, and which trust it is morally and constitutionally bound to execute in good faith; and it can not rightfully assume, by its legislative department, to determine conclusively upon the validity of such *private claim*, or forbid the claimant his day in court, much less to seize upon and sell such *private property*, to private use. But, as no *motive* of injustice to the citizen can be attributed to Congress, the wrongs which may have resulted from their conflicting and inharmonious action, being ascribable to inadvertence, it is not unreasonable, as has been most generally the case, the claimant should forego his strict rights, and accept a remuneration therefor. Your committee, however, maintain he is *not bound* to do so; and may assert his rights against the Government assignee of his property, regardless of federal legislation to restrain him.

In the case of the United States *vs.* Perchman, 7 Pet. R., 51, the court say:

"Even in case of conquest, it is very unusual for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world, would be outraged, if private property should be generally confiscated, and *private rights annulled*, on a change of sovereignty of the country."

In thus following the Attorney General in his exposition of the character and validity of these claims under the treaty, and of the rights and powers of Congress in legislating upon them, the conclusions of the committee are nearly the reverse of those arrived at by him. His reasoning, as it appears to the committee, is a vindication of *Government power* against *private rights*. The one is justified without distrust; the other is depreciated with

but little favor. Your committee, on the contrary, have considered these Government powers as prescribed by the constitution, and have presented the private rights of the citizen as protected by great conservative principles, which the accidents or caprice of legislation, in disregard of these principles, are impotent to subvert.

From these views, we pass to the more direct construction of the law from which the conflict of private claims has arisen as presented in the report of the land officer of the Government.

This opinion assumes that the claims confirmed by the act of July 4, 1836, must yield—

1st. To prior confirmations. Your committee do not think this rule should be adopted, and that such priority should result from the *mere fact*, that these other claims for the same land were *first confirmed.* The act of 1836 does not, in *terms*, so appoint, and an equitable solution of the matter in conflict, would not seem to require it. The first section of the act of 1836 saves and reserves "to *all* adverse claimants the right to assert the validity of their claims in a court or courts of justice." But, by the 2d section, there is excepted from the act, such claims as had been previously *located* by any other person or persons *under any law of the United States*, as also purchasers, *by sale*, from the United States; as to both of which, and *as against either*, the act of 1836 does *not confirm the claims therein referred to.* The question thus arising from the face of the act is, whether a saving in favor of such right as had attached by a *previous* "*location*," under some "*law of the United States*," or *a sale by the United States*, includes a *confirmation* of a *previously-existing located claim?* Is the *confirmation* made by this act of 1836, a "*location*" of land under "*a law of the United States?*" The committee can only understand the terms "*location of land*" as the layings down upon lands a *grant* or *title* previously afloat. Such of these French and Spanish claims as have been appropriated by a *location*, "*under any law of the United States*," the committee consider, must yield, *so far as the action of the land office is concerned*, to such previous location. But if there be, in fact, any cases of conflicting *confirmations*, as distinguished from location claims, it would seem to your committee well enough to give each, his patent, and the courts will readily determine the better claim.

School sections your committee consider are within the exception of the 2d section of the act of 1836. They are grants under *law of the United States* precedent to the public surveys. And a survey and designation of the 16th section is a *location* of such grant.

Titles, too, arising after a *survey* of the lands, and *by sale of the United States*, are protected by the act, though sold in violation of law forbidding their sale. The second section of the act of 1836 is explicit upon the subject, and obligatory upon the *land office*, leaving the Spanish or French claimant no other redress against such sales than may be afforded him by the courts.

In respect to the New Madrid locations, your committee differ entirely from the opinion under review. They have conceded that the express requirements and directions of the acts of Congress, *as addressed to their ministerial agents*, are to be observed and carried out, though wrong, oppressive, and unjust to the citizens, unless such law be manifestly unconstitutional.

But the injustice proposed on this point, in the decision of the Attorney General, has not, in the opinion of your committee, been directed by the Congress. The act of 1836, sec. 2, is as follows:

"That if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other persons, *under any law of the United States*, or had *been surveyed and sold by the United States*, this act shall confer no title to such lands in opposition to the rights required by *such location* or *purchase*."

It is admitted by all that the lands included within these French and Spanish claims were, by the act of the 3d of March, 1811, *reserved from sale*. The act of the 17th of February, 1815, which originated the New Madrid claims, authorized the claimants whose lands were injured by the earthquakes to *locate* a like quantity of land on any of the public lands of the said territory, *the sale of which is authorized by law*.

It is a simple and plain proposition, therefore, that, as the lands included in these French and Spanish claims were not such public lands, the sale of which were authorized by law, they were not, of course, subject to these New Madrid locations.

But these New Madrid claims were not restricted in their location upon these private French and Spanish claims, merely because the law of 1811 declared their reservation; but because the New Madrid act authorized location only on such of the "*public lands*," "*the sale of which is authorized by law*," was then, at the date of the act, authorized by law, such as had *been surveyed, and offered to sale in the public market*.

How could the holder of such a claim, in violation of both the law under which he claimed, and against the interdict of the act of 1811, assert *the right*, nevertheless, to seize on and appropriate these lands covered by the French and Spanish claims—*private property*, secured by treaty, and expressly reserved by law. On this point your committee are fully sustained by the opinion of the late William Wirt, Esq., while Attorney General of the United States, given on the same question, of date October 10, 1825; and of another opinion of the same officer, of date 22d October, 1828, involving the like principle, and both of which your committee herewith present (marked A and B) as part of their report.

But the present Attorney General thinks the construction of the act of 1836 upon its face justifies the opinion, that *Congress designed* to ratify and legalise the location of New Madrid claims, made *in fact against* law; and that they have expressed that intention by the language used in the saving clause of the act of 1836 in favor of such previous locations as had been made "*under any law of the United States*."

No one will pretend that if these New Madrid locations have been made on the lands included in these French and Spanish claims, that they were *so made* under or pursuant *to any law of the United States*, but were, in fact, made in violation of such laws. What rule of construction, then, demands of us to ascribe to Congress an intention to use the same language to describe locations made in manifest, admitted, palpable violation of law, as if made in pursuance of, and in conformity with law? And if the circumstances under which the law was passed are appealed to as aiding the construction, is it to be imputed that Congress has intended to give New Madrid locations, which, as floats, are mere gratuities, such a precedence over these *private claims*, protected, as they are, by treaty of Louisiana and the constitution and laws of the United States?

But the language of the act fairly excludes any such construction. It is seen that the same clause in the act of 1836 which excepts from confirmation certain locations, excepts also such of the lands as "*had been surveyed*

and sold by the United States," not such lands as had been surveyed and sold "*under any law of the United States.*" For it was familiarly known, if *sales* had been made of these lands, they were most probably made *without and against law.* Hence the exception in favor of PURCHASERS is obviously to secure and validate a sale inadvertently made by the United States, though *not made pursuant to law*, and the language conforms to such a purpose. But in reference to *location claims*, they have only expressed a purpose to protect such as have been made *under any law of the United States.* But the Attorney General has reasoned as if, in consequence of the law of 1811 reserving the French and Spanish claims from sale, there can have been no location of a claim made *under any law of the United States*, unless the New Madrid locations can be so regarded. What may be the precise facts, is unknown to the committee; but of the numerous laws of the United States which at different times have authorized *locations* of floating claims, if any of them of date subsequent to the act of 1811 gave *an affirmative right* of location in language so broad as to authorize an entry upon these French and Spanish claims, however unjust such laws might be regarded, it would not be a strained construction to say that, as to such subsequent laws, they so far repealed the reservation act of 1811 as to permit their contemplated locations upon the lands reserved by the act of 1811. If there be any *such locations* now in conflict with the confirmed claims of the act of 1836, such locations *are made under laws of the United States*, and in the administration of the land office must have priority. But if there be anything binding in treaty and constitutional provisions—anything sacred in private and vested rights—a *patent* issued even to such a location claim would be held by the *courts* as the legal title *in trust* for the French or Spanish grantee. And if, as is intimated by the Attorney General, there are no *locations* involved in this inquiry which have been made "*under any law of the United States*," it is no fault of the land commissioner, nor in default of such does it become his duty to take such locations as have been *made against law* in substitution for the more *just* and righteous requirement of the act of 1836 on the subject.

Your committee have, therefore, no hesitation in saying the New Madrid claims *are not* entitled to priority over the confirmations of the act of 1836.

Having thus considered of the matter submitted to them, and having no measure or action to recommend in the premises, your committee ask to be discharged from the further consideration of the subject.

A.

OFFICE OF THE ATTORNEY GENERAL,
October 10, 1825.

SIR: The case referred to me by your letter of the 4th instant from the General Land Office, has had my earliest attention; and, after a careful examination of the acts of Congress on the subject, I am of the opinion that the practice of suspending patents, stated by the Commissioner, is perfectly correct. In the particular case I can see no benefit which can arise by issuing the patent immediately, and no injury which can arise to the individual by withholding it; it may eventually prove to be a needless expense and trouble, and may moreover create improper embarrassment to the petitioner before the district court. The claim on which Mr. Bates demands a patent is one of those which are known to our laws as New Madrid claims. By the act of the 17th February, 1815, "for the relief of the inhabitants of the county of New Madrid, in the Missouri Territory, who suffered by earthquakes," it is provided that those sufferers "might locate an equal quantity of land with that which they had lost, on any of the public lands of the said Territory (Missouri), the sale of which is authorized by law." In order to ascertain what lands were then *authorized by law*, we must look to the act of the 3d March, 1811, providing for the final adjustment of the claims to land, &c.; the 10th section of which describes the lands which the President was authorized to sell, and by the proviso to which section it is expressly declared that, *till the decision of Congress thereon, no tract of land shall be offered for sale*, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana.

It is scarcely necessary to remind you that this Territory is the same which by act of Congress in the following year (June 1, 1812) took the name of Missouri.

Again: by the 3d section of the act of 17th February. 1818, entitled, "An act making provision for the establishment of additional land offices in the Territory of Missouri," it is declared that, whenever a land office shall have been established in any of the districts aforesaid, the President of the United States shall be authorized to direct a sale of the public lands therein, *with the same reservations and exceptions* as was provided for the sale of public lands in the Territory of Louisiana, by the 10th section of the act of the 3d March, 1811, which we have just examined. So that the reservation of lands to which claims had been filed, as set forth in the proviso of that section, became permanent; and, being excepted from the sale of the public lands, did not fall within the description of those lands on which the New Madrid sufferers were authorized to make their locations. Among the documents handed to me on this subject, is a letter from the late Secretary of the Treasury (Mr. Crawford) to the Commissioner of the Land Office (Mr. Meigs), bearing date on the 10th June, 1818, in which I perceive that he takes the same view of this exception, and gives the necessary orders to exempt the lands so claimed from public sale. The decision of Congress—until which, lands claimed as above were to be reserved from sale, and consequently from location by the New Madrid sufferers—was not finally taken until the 26th May, 1824; when by the acts of

that date, enabling the claimants to land within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims, the claimants were authorized to file petitions in the district court of the United States for the State of Missouri, for the trial of their claims; and by this law it is expressly provided, on the one hand, that when any claim has been decided against the claimant, the land shall belong to the United States; and on the other, that where the decision shall be in favor of the claimant, and the land shall have been previously sold to another person by the United States, the party interested may reimburse himself by a location elsewhere.

Now, the claim which Mr. Bates represents is a New Madrid claim, which is stated to have been improvidently located on some of this interdicted land; with regard to which, the claimant has filed his petition before the district court, and the case is still *sub judice*. Mr. Bates demands the patent, because, however these facts may be, he has produced the patent certificate; and the issuing of a patent is an act so purely ministerial, that the officer is bound to issue it, although he may see distinctly that it is about to issue for lands not at all subject to the claim. That is to say, the President of the United States, whose peculiar constitutional function it is to see that the laws are properly executed, is himself to become instrumental in a conscious breach of these laws, by signing the patent, because an inferior officer has ignorantly taken a false step in giving what Mr. Bates calls a *patent certificate*. I am not of this opinion. On the contrary, I think it most proper that all executive action on the subject should cease, until the judiciary shall have decided on the claims.

The documents are returned.

I have the honor to remain, sir, very respectfully, your obedient servant,

WM. WIRT.

B.

ATTORNEY GENERAL'S OFFICE,
October 22, 1828.

SIR: On the case stated from the General Land Office, under date of the 6th instant, it is my opinion that no patent ought to issue for lands which have been inadvertently sold without any legal authority to sell them; the mistake having been brought to the knowledge of the Commissioner of the General Land Office before the emanation of the patent. Lands excepted from sale by acts of Congress ought not to be sold; and if they have been inadvertently sold, the sale is void for want of authority. To issue a patent for lands which the Government had no power to sell, is a measure which I can not advise. No subsequent decision of a court as to the invalidity of the unconfirmed claims, whose pendency led Congress to except these lands from public sale, can correct the original error; for, after such a decision, the result will still be that these lands have never yet been sold: they have not been sold, because there was no power to sell them. The sale was void in its inception; and such lands remain among the unsold lands of the United States, and must be offered again for sale when there shall be power to offer them. It will be far better to undo, or to consider as already absolutely undone, what has been done

without authority. These sales are now, in legal contemplation, mere nullities; and with the discovery and full knowledge of the fact before us, why should we persist in the error, and affect to clothe with the solemnity of a patent an act which we know to be utterly null and void?

My opinion and advice is, that the purchasers from the United States be informed of these mistakes; and that, in so far as their purchases have included lands inadvertently sold, without authority, they are void. Cases may arise in which the same purchase has included lands which there was authority to sell, with other lands which there was no authority to sell: and the purchaser may have been induced to make the entire purchase by the value which he attached to the lands which there was no authority to sell. In such a case, the contract being one and entire, and founded in mistake, it ought to be considered wholly void, at the option of the purchaser; or, if he prefers it, he might receive his patent for the land which there was authority to sell, excluding from it that which there was no authority to sell.

WM. WIRT.

To the SECRETARY OF THE TREASURY.

GENERAL LAND OFFICE, *March* 7, 1842.

SIR: By the resolution of the Senate of the United States, adopted on the 2d instant, it was—

"*Resolved*, That the Commissioner of the General Land Office be directed to send to the Senate a statement showing the construction given by him, in practice, to the act of July 4, 1836, confirming the reports of the board of commissioners appointed to investigate private land claims in Missouri, under the acts of July 9, 1832, and March 2, 1833; and whether, in his opinion, any further legislation is necessary to enable him to carry out effectively and justly said act of 4th July, 1836."

In obedience to that resolution, the undersigned has the honor respectfully to submit, that the construction which he gives to the aforesaid act of 4th July, 1836, is as follows:

That all claims confirmed by the aforesaid act of the 4th July, 1836, are subject to, and must yield to—

1st. Prior confirmations.

2d. School sections.

3d. To ordinary sales prior to the said confirmatory act of 4th July, 1836.

4th. To New Madrid locations, under the act of 17th February, 1815.—(Land laws (Clark's compilation), page 667, chap. No. 248.) His construction of the act recognizes—

5th. As the *confirmee*, the individval who, according to the reports, presented the claim before the board [present claimant], as the assignee or legal representative of the original grantee.

6th. And recognizes the right of the individual whose claim may be interfered with by prior valid claims, to make his location of the amount or quantity of interference within the State in which the original claim may be *in legal divisions and subdivisions*, of the description of lands mentioned in the second section of the aforesaid act of 4th July, 1836, without confining them to one continuous body of land, or even to one land district.

7th. The undersigned also considers the power sufficiently implied to

authorize the issuing of patents for the portion of the confirmed private claim not interfered with.

The undersigned, it may be proper to remark, entertained doubts as to the validity of New Madrid locations interfering with claims that had been duly filed and confirmed by the act of 4th July, 1836, and was of opinion that the new locations authorized by the second section of the confirmatory act should be made "on separate tracts, conforming to legal divisions and subdivisions, at one time, and within one and the same district."

The construction stated in the foregoing as now given to the act, is in accordance with, and governed by, the Attorney General's opinion of the 7th of December last (copy A, herewith).

The whole subject, it is found, was submitted by the predecessor of the undersigned to the chairman of the Committee on Private Land Claims, Senate United States, under date the 25th January, 1840, Senate document 173, 1st session, 26th Congress, recommending "legislation, in the way of a declaratory law, on the different classes of cases referred to in the correspondence," as "indispensable to the just determination of the several interests involved."

Such legislation the undersigned considered as every way desirable in his first examination of the subject, in order to put the matter effectually at rest, so far at least as the Executive action is concerned, inasmuch as important interests are involved, and great doubts had arisen as to the true construction of the act of July, 1836.

But as Congress had not further legislated in regard to the subject, he deemed it necessary and proper for the Department to proceed in the premises under existing enactments; and this he proposes to do under the construction submitted as above, unless it should be the pleasure of Congress otherwise to direct.

All which is most respectfully submitted.

E. M. HUNTINGTON,
Commissioner.

Hon. SAMUEL L. SOUTHARD,
President of the Senate, U. S.

GENERAL LAND OFFICE, *March* 24, 1842,

SIR: The Senate of the United States adopted, as you are aware, a resolution on the 2d instant, requiring of the Commissioner "a statement showing the construction given by him in practice to the act of July 4, 1836, confirming the reports of the board of commissioners appointed to investigate private land claims in Missouri, under the acts of July 9, 1832 and March 2, 1833; and whether, in his opinion, any further legislation is necessary to enable him to carry out effectively and justly said act of 4th July, 1836."

On the 7th instant, I had the honor to respond to that resolution, and in conclusion stated that I deemed "it necessary and proper for the Department to proceed in the premises under existing enactments, and that this I proposed to do under the construction submitted" in my answer to the resolution, "unless it should be the pleasure of Congress otherwise to direct."

As the resolution referred to was presented by you, I take the liberty, most respectfully, to request that in case it should be determined not to introduce any further measure of legislation on the subject, that such determination

may be indicated in any manner deemed proper, at a convenient time, so that this office may govern itself accordingly, and proceed to further action in the way of giving full effect to the aforesaid confirmatory law according to the construction submitted.

With great respect, your obedient servant,

E. M. HUNTINGTON,
Commisssoner.

Honorable LEWIS F. LINN,
Senate of the United States.

A.

OFFICE OF THE ATTORNEY GENERAL,
December 7, 1841.

SIR: In compliance with the request which you did me the honor to make in your letter of the 14th of October last, I have availed myself of my earliest leisure, to consider the matter of the Missouri land claims, as stated in the letter of the Commissioner to you, of the 21st of December, and a sort of exhibit, marked A, that accompanied it.

I will begin by observing, that these papers are all that appear among those sent me, in anything approaching the shape of a *state of the case or cases*, on which my opinion is required. They amount to no more than the propounding, in the abstract, of certain general questions.

The paper marked A, for instance, is in the words following: "As to private claims, that have been duly filed, and which are entered in the first class of the decisions of the late board of commissioners in Missouri, under the acts of 9th July, 1832 and 2d March, 1833, for the final adjustment of private land claims in Missouri, and which claims are confirmed by the act of 4 July, 1836, 'confirming claims to land in the State of Missouri, and for other purposes;' the following questions are respectfully submitted for the Attorney General's opinion, and the instructions of the honorable Secretary of the Treasury, for the guidance of the General Land Office, in its definitive action on the said claims: are the following classes of claims, or either of them, valid or not, as against the claims confirmed by the act of 4th July, 1836, abovementioned, viz.:

"1st. Prior confirmations.

"2d. School sections.

".3d. Ordinary sales prior to the said confirmatory act of 4th July, 1836.

"4th. New Madrid locations under the act of 17th February, 1815. *Land laws*, *page* 667, *chapter* 248.

"5th. Is the individual who, according to the reports, presented the claim before the board, as the assignee or legal representative of the original grantee, to be recognized as the confirmee; or is the original grantee to be recognized as the confirmee.

"6th. Must the claimant whose claim may be interfered with by prior valid claims, be confined, in making his location of the amount or quantity of such interference, to such legal subdivisions of the public lands, as will, together, form one body or tract of land, or may he locate the quantity or amount of such interference on separate tracts, confirming to legal divisions

and subdivisions at one time, and within one and the same district; or can the claimant be allowed to take part of his new location in one district, and part in another?

"7th. The remaining question. Is the power sufficiently implied to authorize the issuing of patents for the portion of the confirmed private claim not interfered with, or must further legislation be awaited on this point?"

I do not dissemble the reluctance which I feel, as every practical lawyer must feel, to deal with abstract or speculative questions. I need not say that the courts will never consent to touch them. There is always more or less of uncertainty in answers which must be hypothetically given; and it not unfrequently occurs, that after bestowing the most elaborate attention upon some one or more aspects of a case, the counsellor finds, to his mortification, that the true question at issue does not happen to have occurred to him, among the many examined.

What makes my task more difficult in the present instance is, that on the face of the papers sent me, it is apparant that there has been for twenty years past great conflict of opinion, and the most active discussion and litigation, on all the points involved. I perceive that not only Solicitors and Commissioners of the Land Office have written long opinions upon them, but that no less than three of my predecessors have been successively consulted. One of them* regarded the difficulties as susceptible of no solution, but by a special act of Congress.

In the face of all this acknowledged doubt and perplexity, I am now called upon to revise their judgments, and to pronounce one myself, which may after all only increase the litigious matter in the premises, to be laid before some successor of my own.

However, I will to the best of my abilities endeavor to meet and to solve the difficulties that embarrass the department; at least it is entitled to my opinion, and I am bound to give it as it is, right or wrong.

To begin with a general view of the nature of these claims under the treaty with France, which is the origin of the whole discussion.

In the first place, it is to be remembered that the confirmees under the treaty claim, *not property*, strictly so called, or the dominium of the civil law, but the doing of what is necessary to complete *title* and to *convey* property. The lands to which they lay claim, *form still* (where patents have not been granted) *a part of the public domain of the United States;* and although the United States acknowledge themselves bound to provide for those claims, still the whole subject is in *contract*, and their rights are only *jura ad rem*, under a treaty with a foreign Government.

This distinction is nowise important with a view to the question, whether those rights shall or shall not be held sacred; but it is very important, with a view to the question how they are to be satisfied, how they are to be regarded by courts of justice, how they have been affected by federal legislation, how they stand when they come in conflict with the rights of others, who with *equal* equity happen to have the advantage of an actually vested *legal* estate. It is obviously very important to the great question that would arise between individuals, whether they may *vindicate*, in the language of the civilians, that is, insist on having the *specific thing*, as described in their grant, or shall be allowed only damages amounting to full indemnity for the breach of the contract.

*Mr. Grundy.

By the law of nature, which binds sovereigns, it is extremely doubtful, according to the opinions of the first jurists of the time, whether there be any redress for any breach of contract, but in damages. Accustomed, as we are, to the proceedings of our courts of chancery, which enforce in cases of a peculiar character, and by the exercise of an extraordinary jurisdiction, *specific performance* of a contract for the sale of lands, we forget that this is an artificial rule, altogether unknown to the common law.

At any rate, this is the view, in my opinion, which Congress took of its own responsibilities, under the treaty of 1813; and interpretation of treaties, as well as the manner of fulfilling them, being as against the Government, a matter properly of political cognizance, this office and yours are bound by the will of Congress in the premises. This is familiar doctrine in courts of prize.

It does not in the least signify to us whether or no, by the law of nations, Congress was bound to confirm specifically the grants it acknowledges to be binding upon its conscience. The question for us is, what did Congress think of its own obligations in this particular, and how has it seen fit to perform them? Did it mean specific performance? or compensation and indemnity only? It was a question for their sovereign (for so in the case it was) determination, and their *sic volo* is conclusive for us.

I think their conduct defensible and fair; but that has nothing to do with the subject, or my *legal* judgment upon it.

Take the analogy of the Florida treaty, as to which I gave you an opinion some weeks ago. By one of its stipulations, this Government was bound to make compensation for injuries admitted to have been done by its troops in 1812, and to submit the alleged injuries in every case to examination, according to the usual course of the judicial authorities. Yet Congress, when it came to legislate upon the subject with a view to its ultimate responsibility, in regard to it, ordered the Secretary of the Treasury to pay not *all* the awards of the court in Florida, but only such as he should deem just. Clearly you have no authority to go any further toward fulfilling the treaty, than you are allowed under this strict precept, as I then had the honor to advise you.

And so it is, in my judgment, with regard to the Spanish and French grants in question.

It seems to me very clear that both the act of 1824 and that of 1836 meant that no confirmation, made by virtue of them, shall be carried into specific performance, if that can not be done without unsettling titles in the country in question. Neither the two acts, nor all the parts of each, can be read together in any other way. The exception is in the act of 1836, section 2, of lands previously located under any law of the United States, or surveyed and sold by the United States, and, in the act of 1824, the words are still more comprehensive. They cover *all* the locations made (to which there exists not some incurable objection distinct from these claims, of which by-and-by), and all sales susceptible of *confirmation by an act of Congress*. To say that this exception does not protect those whose locations cover the lands subject to the claims confirmed by these acts, because these lands had been reserved in the act of 1811, section 6, and were thus not subject to location or sale, is to make the exception a solecism in terms. It would be to except what was not excepted, which were absurd, and so the argument proves too much. If locations made under law mean lawful locations, and sales mean valid sales, there would be none such, according to this showing itself, on lands reserved by a permanent act (1811) from sale or location. But the ex-

ception, in my opinion, is not nugatory. On the contrary, the facts disclosed on the face of these papers, and the fieree and strenuous litigation that has already sprung out of some of the claims, shows that it was a wise and beneficent provision of the Legislature. If ever a slight deviation from the rigor of abstract principle was justified (as the history of our law shows it has been so often defended) by the argument *ab inconvenienti*, against shaking titles, taken on mistakes of fact, or a mistaken view of the law, it was in this case. I have no doubt at all that Congress did legislate with a view to heal the evils, of which an indiscriminate specific performance of the grants in question would, as appears from the papers before me, have been so prolific.

This is the great principle, binding upon your Department, from which I set out, and on which I bottom all my conclusions on this subject.

It will be quite apparent, from all the acts taken in *pari materia*, that Congress reserved to itself from the beginning the power of doing just what I take it to have done, namely, to execute the treaty in good faith, but with a sound discretion and due regard to the quiet of titles.

The result of the whole is, that it endeavored, as far as possible, to reserve from sale and occupation all the lands subject to claim under foreign grants; but yet took care that, in the complexity and uncertainty of the whole subject, and the difficulty as well as delay inseparable from the adjusting of so many titles, real or pretended, some, perhaps all of them, standing in the way of the rapid progress of population in the west, the Commonwealth should suffer no detriment. It prevented, as far it might, that is it forbid, the sale and occupation of such lands, yet, knowing that, after all, they had not been prevented, finally acquiesced in an inevitable abuse.

It accordingly kept the control of the whole subject in its own hands, and at last settled or rather precluded controversies that would otherwise have sprung up, by fulfilling the treaty, under what I consider a very reasonable and wholesome qualification, with a view to titles voidable, indeed, or even void as against itself, but which could not be declared so without infinite mischief.

Thus, in the act of March 3, 1811, section 6, in the very clause so much insisted on by the advocates of the confirmees, it is provided "*that, till after the final decision of Congress thereon*, no tract of land shall be offered for sale, the claim to which has, in due time and according to law, been presented to the register of the land office, and filed in his office, for the purpose of being investigated," &c.

So, by the act of June 13, 1812, for settling claims in Missouri, section 8, it is enacted that the recorder of land titles shall have the same powers in relation to claims filed, &c., as the former commissioners, except that all his decisions *shall be subject to the revision of Congress.*

By the act of July 9, 1832, section 3, it is enacted, that lands contained in the first class (such as would have been confirmed by Spain, &c.), shall continue to be reserved from sale as heretofore, *until the decision of Congress shall be made thereon, &c.*

It is clear, therefore, that Congress never meant to be bound absolutely by any award of the recorder and commissioners; but to do what should seem to itself agreeable to equity and reason, on a full and final survey of the whole subject.

Accordingly, its final decision *was* pronounced by the act of 1836, and tha act conforms to the view here presented of its purpose, and is in my opinion inconsistent with any other. But, as I have said, in the previous

act of 1824, it had taken the same precautions. By that time, it began to be apparent that the reservation made in the act of 1811 had been (as from the facts before me it manifestly was) neglected in practice.

In 1815, the act authorizing the New Madrid locations had been passed, and those locations, although in strict law not authorized on lands subject to French and Spanish claims, had *in fact* been made upon such in very many instances. It was, indeed, almost inevitable they should be.

Many of these claims were, it seems, so indefinite, that the lands called for by them could not without much difficulty be identified. Many of them were spurious, or sustained by no proof, and, being finally rejected, the soil claimed fell back into the mass of the public domain. There was great delay in presenting and establishing others, &c. Under such circumstances, many titles had been acquired, many patents issued, and improvements made, without due regard to the ultimate (and what was no doubt considered as the remote) possibility of ouster under these claims.

We all know how impossible it is for the Government to stay, or even to regulate, the eager rush of our people into the new lands. It accordingly did in that case, what it has been over and over again constrained to do, as against itself, by its pre-emption laws,—it sanctioned what it could not prevent, and made compensation to the claimants under a treaty with a foreign power, which it could no more execute, literally, than it could its own laws with regard to the sale of its domain.

I say, claims under a treaty —claims against itself as a Government—*claims which no court has any right to enforce*, and which bind Congress only in conscience, and bind the other departments only so far as Congress has been pleased to acknowledge them; for although by referring these claims to the decision of a district court, with an appeal to the Supreme Court of the United States, they are made, to a certain intent, judicial questions; yet it is only so far as regards their validity as *claims* or *jura ad rem*. The inquiry, is this a good and valid, or a false and groundless claim, is, under these acts, to be answered by the courts; but the subsequent question, supposing it to be the former, how shall it be executed, is one which, under the acts of 1824 and 1836 (read together), Congress has, in my opinion, in all cases within the exception referred to above, reserved for its own decision; and, in regard to which, it has decided that the execution shall be by an equivalent in land. To say that Congress, having granted once by the treaty, has no power to make a second grant, is to mistake a claim to land protected by a treaty with a foreigner for a title actually vested in a citizen under the constitution of the United States, which are, in my judgment, two very distinct things. At all events, as far as the powers of the Executive department are concerned, the acts of Congress in this particular are conclusive upon it. The act of 1836, according to this view of it, is a *legislative confirmation* of all *voidable locations made under any law of the United States or sales by the United States of any* description whatever. I see no restriction or qualification in the act; and since its very object is, as I have shown, to give validity to these sales and locations, in spite of one fatal objection (that the lands subject to these claims were not *in commercio*), I see no reason why it should not be interpreted as curing all other defects which are susceptible of being cured by an act of Congress. The words of the law are as large as the purview thus ascribed to it certainly, and Congress had the power and the *right* to pass it just in that shape, and, I will add, in my judgment, acted wisely in doing so.

Put the strongest case of those stated, that of the New Madrid locations.

Certainly Mr. Wirt (Opinions, &c., vol. 2, p. 14) pronounced them void when made on lands not subject to sale, lands for instance not surveyed or lands expressly reserved from sale. But then the same learned lawyer admits in the same place (as, indeed, who could deny?) that the defect might be cured by act of Congress.

Now, it is my opinion that the act of 1836 does cure defects in such locations which fall within the words "lands located under a law of the United States," namely: the express provision of the act of 1815, and that not quite gratuitously, for the titles of their former lands (injured by the earthquake) were to be surrendered or conveyed to the United States.

In short, sales or locations which, under the general land law would be held void by the Executive department of the Government, are simply voidable in regard to Congress, and may at any time be rendered valid by its acts, provided only, as in the case before me, it has done nothing that amounts to a complete alienation to others. On the whole, I am of opinion that all the first four classes of cases stated above are valid as against the claims confirmed by the act of the 4th July, 1836.

I need not say that I deliver this opinion with the hesitation and diffidence naturally inspired by the difficulties of a subject that has employed so many abler, and in these matters, more experienced minds, and that I am aware some of the positions here maintained may seem to conflict with *obiter dicta* of the courts; but I see no other conclusion that conforms more to what appears to me the scope and objects of the act of Congress, as well as to the established principles of the law.

The other three questions, though of minor importance, are not without their difficulties.

5th. To the fifth question, I feel myself constrained, by the judgment of the court (very questionable if received in its whole extent), in Strother *vs.* Lucas, 12 Pet., to answer, with my predecessor, Mr. Butler, that the individuals who appeared as claimants before the commissioners, and have obtained their favorable decision, are the persons who are to be recognised at the General Land Office as the confirmees under the act of 1836. That I may not be misunderstood, however, I have no hesitation in saying that, in my own private opinion, no commission, &c., to adjust claims under a treaty or convention with a foreign nation, can, in the absence of express authority to entertain adversary suits between different claimants, be considered as empowered to do anything more than determine whether the claim itself, without regard to the actual claimant, is valid as against the Government. I believe the very last decree given by Lord Elden was to this effect, in regard to an indemnity convention with France.

6th. I see nothing in the statute to prevent the claimants locating the quantity taken from them by the interference in question, on separate tracts, conforming to legal divisions and subdivisions, which is the only restriction expressed. The argument, *ab inconvenienti*, against this conclusion is very strong; but then it must be remembered that, according to the previous reasonings, the case of these claimants is one in which Congress, having postponed their rights, under the treaty literally interpreted, to the equities of others and the policy of society, might very well be expected to show a certain liberality in the equivalent it offered.

7th. Strother *vs.* Lucas decides, as Mr. Butler remarks, this question too against the necessity of issuing patents for the portions of the confirmed grants not interfered with. Yet, were it not for the word "titles," in the act of

1836, I should hold that patents were necessary, the confirmation being, by the supposition, of mere inchoate titles under the Spanish or French grants. At all events, since this is a question of a practical character, and to be governed very much by the course of the land office, I see no very conclusive reason against issuing the patents in question. If superfluous, they can do no harm; if not, they ought to be issued in execution of the treaty. But in that case, I should hold any claimant who accepted a patent for less than his claim with an equivalent elsewhere, as for ever estopped as against the United States and its privies.

I have thus given to you the best judgment which I have been able to form upon this very difficult and complicated case; a good deal of which difficulty and complication, however, in my opinion, belongs not so much to the questions involved as to the manner in which they have been treated by others. And I can only add, that, should it not be satisfactory to you, I see no remedy or resource but in a special act of Congress, declaratory of its own purposes, or in some solemn judicial decision, precisely upon the points herein insisted on in behalf of the Government.

The papers are returned herewith.

I have the honor to be, sir, your obedient servant,

H. S. LEGARE.

Hon. W. FORWARD,
Secretary of the Treasury.